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UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Working Group on
International Payments
Twenty-first session
New York, 9-20 July 1990

INTERNATIONAL CREDIT TRANSFERS

Proposal of the United States of America

Note by the Secretariat

1. At the twentieth session of the Working Group the delegation of the United States suggested the possibility of restructuring the Model Law into two parts: one applicable to high-speed systems and another applicable to slower systems (A/CN.9/329, para. 197). The delegation has now submitted its proposal as to how such a restructuring might be accomplished.

2. This note contains in the annex the covering letter from the United States delegation plus its proposal with explanatory comments.

ANNEX

Covering letter from the United States, dated 6 June 1990

We have enclosed several proposed modifications to the draft model law for international credit transfers being prepared by the Working Group on International Payments.

Together with many other delegations, we have seen the preparaton of this model law as an important opportunity for UNCITRAL to be among the first international bodies to achieve harmonization in international trade law in the new field of electronic commerce. A project of this nature is of course difficult, since it must deal with the conflict between newly emerging commercial practices and traditional laws and obligations.

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At the conclusion of the last Working Group session on this subject, which took place in Vienna November 27 - December 8, 1989, the U.S. delegation expressed serious concern as to the direction the draft model law was taking, and whether as then drafted it was compatible with new electronic banking and clearing systems. We believe that any proposed international rules must recognize high-speed systems and the changed legal relationships that result. Otherwise, the rules if adopted would have the effect of impeding new commercial methods, rather than facilitating world trade. In the latter case, such rules may be unlikely to achieve widespread acceptance by States, and UNCITRAL would have lost an opportunity to be a leader in setting norms for modern electronic commerce.

Bank credit transfers, which are an important part of the new electronic commerce, can play a role in expanding services and lowering costs for commercial parties in all nations, regardless of their state of economic development or particular trade interest. With respect to commercial users, as distinct from consumers, modern electronic transfers today offer the option of high-speed, low cost transactions. Such transactions may depend on electronic clearing houses which, through computer-assisted high speed systems, are able to handle very large volumes of transactions daily. At the same time, these computer-assisted systems, because of their very high volume, operate on a "best-efforts" basis and cannot undertake the same obligations that may accompany traditional funds transfers.

The latter may involve conditional payments, bank verification of transactions, reversibility, indeed many other facets may involve direct intervention by bank personnel. Commercial customers are likely to want the option of using either more traditional transfer methods, which may also use electronic means but would involve a wider range of responsibilities by banks and involve higher costs, or the newer high-speed systems at low cost. In the latter case, customers are likely to absorb certain risks in order to use those services; for example, computer-assisted systems at high speed and volume cannot normally accommodate reversal and do not allow for individual transaction monitoring and consequent exposure to responsibilities for errors or failures in the same manner as do traditional credit transfer methods. The sheer volume of transactions places real burdens on banks and clearing houses with respect to notice obligations and liability for damages, which must be taken into account if any proposed rules are to be compatible with the newly emerging electronic clearing systems.

At the conclusion of the last Working Group session, the U.S. delegation suggested that the Working Group might wish to consider preparing two sets of rules, rather than one, in order to separate the rights and obligations of parties to banking transactions into two options - the first dealing with emerging practices in high-speed electronic transfers, and the second covering traditional transactions, which could accommodate paper-based as well as more rapid methods of transacting commerce. In the latter, originators would expect a broader range of responsibilities in return for greater cost and less speed.

There are several ways to achieve this "two-track" system. We have attached one proposal that would accomplish this by assuring through choice of law and conflict of law provisions the right of parties to engage in transactions under rules developed for electronic commerce. Such an approach could leave in place the present draft as modified by further work of the Working Group and the Commission. At the same time, it would allow for application of rules designed for high-speed transfers and therefore assure the relevance of the Model Law to commerce as it is likely to be practiced by an increasing number of commercial parties and states. A separate method would be to draft two sets of rules by declaring certain provisions of the present draft inapplicable to high-speed transactions, as defined, and by writing new rules to cover those transactions.

These suggestions are being made in order to facilitate the discussion of the Working Group. We remain committed to the importance of the Commission finishing its work on this subject as early as possible.

Proposal by the United States Delegation to amend the Draft Model Law on International Credit Transfers to accommodate high speed electronic transfers

At the twentieth session of the Working Group on International Payments, the U.S. delegation expressed its concern that the text of the Draft Model Law would not be suitable for credit transfers made over systems that have been designed to accomplish a transfer with high speed, maximum security, and low cost. Accordingly, the U.S. delegation suggests that the Model Law be amended so that it would be flexible enough to accommodate this type of system, which might be referred to as a system for effecting "high speed electronic payments". Each proposed revision is set forth below, and is explained in a short comment.

Proposed new paragraph (3) of article 1

"(3) If a credit transfer is a 'high speed electronic transfer', this law applies if any payment order comprising the credit transfer is sent from a sender located in one State to a receiving bank in another State."

Comment

Funds transfer systems like the Clearing House Interbank Payments System ("CHIPS") process high speed electronic transfers. Typically, these transfers are initiated by banks that may be located outside of the United States, but that transmit by wire payment orders that are to be executed by banks located within the United States. Such a CHIPS payment might terminate with a credit to the account of a beneficiary at a bank located within the same State as the originator's bank. This type of transfer would not be covered under the Draft Model Law, because under article 1, section (1), the originator's bank and the beneficiary's bank are in the same State. Proposed section (3) of the Draft Model Law increases the scope of the Model Law so that it covers what are defined in article 2 as "high speed electronic transfers".

READEX

Proposed new subparagraphs (m) and (n) of article 2

"(m) 'High speed electronic transfer' means a credit transfer involving any payment order that is sent through a funds transfer system, which system is used primarily to process payment orders that are (i) sent electronically between banks or between businesses, (ii) intended to transfer value on the same day, and (iii) settled on the books of a bank or a Central Bank."

"(n) 'Funds transfer system' means an electronic transfer network, automated clearing house, or other communication system of a clearing house or other association of banks through which a payment order may be transmitted to the bank to which the order is addressed."

Comment

Section (m) defines the characteristics of the "high speed electronic transfer" which will merit coverage under the Draft Model Law, subject to the "contracting out" provision which is recommended for Article 16. Note that such a credit transfer must contain at least one payment order that is processed by a special type of funds transfer system. That funds transfer system must be one that is used primarily for processing payment orders that are communicated electronically (that excludes instruments which are widely used in some States), and are primarily commercial transfers (that excludes most giro and point of sale systems, which are primarily consumer systems). Further, such a funds transfer system must be used primarily for payments that are not for a future value (which would eliminate most conditional payments), and settlement of the order would be on the books of a bank or a Central Bank. The purpose of the definition is to identify credit transfers like transfers made through CHIPS, which will need to be subject to rules that accommodate their high speed, maximum security, and low cost nature.

Section (n) defines what is a funds transfer system. No credit transfer can be a "high speed electronic transfer" unless at least one payment order is effected through such a system. Again, the definition is sufficiently broad to encompass organizations like CHIPS and SWIFT.

Proposed new paragraph (3) of article 15

"(3) A funds transfer system may select the law of a particular State to govern the rights and obligations of all parties to a high speed electronic transfer. In the event of any inconsistency between any provision of the law of the State selected by the funds transfer system and any provision of this Model Law, the provision of the law of the State selected by the funds transfer system shall prevail."

Comment

Because a high speed funds transfer system may involve parties located in several States, and because the rights and liabilities of one party may be affected by the action taken by another, it is particularly important to have one set of rules govern all parties to a high speed credit transfer. These factors led CHIPS to announce the following rule in April of 1990.

"The rights and obligations of participants and all other parties to a funds transfer of which a CHIPS payment message is a part, arising from the funds transfer or from these Rules, shall be governed by the law of the State of New York. A "funds transfer" means the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order and includes any payment order issued by the originator's bank or an intermediary bank intended to carry out the originator's payment order."

Proposed article 15(3) enables funds transfer systems to promulgate rules like new CHIPS Rule 3. It avoids the possibility of a single funds transfer being subject to conflicting substantive provisions of State law, thereby increasing the predictability and certainty of result that are the hallmarks of commercial law.

Proposed new article 16

"Article 16. Variation by agreement and effect of funds transfer system rule

(1) Except as otherwise provided in this law, the rights and obligations of a party to a credit transfer may be varied by agreement of the affected party.

(2) 'Funds transfer system rule' means a rule of an association of banks (i) governing transmission of payment orders by means of a funds transfer system of the association or rights and obligations with respect to those orders, or (ii) to the extent the rule governs rights and obligations between banks that are parties to a funds transfer in which a Central Bank, acting as an intermediary bank, sends a payment order to the beneficiary's bank. Except as otherwise provided in this law, a funds transfer system rule governing rights and obligations between participating banks using the system may be effective even if the rule conflicts with this law and indirectly affects another party to the funds transfer who does not consent to the rule."

Comment

It is possible that a funds transfer system processing high-speed credit transfers, or two parties to a part of a credit transfer, might want to adopt the Model Law, with some variation. Article 16 permits this, and embodies a policy judgement that parties to a credit transfer should be able to contract out of those provisions which are unsuitable to their specific purposes.

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UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Working Group on
International Payments
Twenty-second session
Vienna, 26 November - 7 December 1990

PROVISIONAL AGENDA

1. Election of officers

2. Adoption of the agenda

3. Preparation of Model Law on International Credit Transfers

4. Other business

5. Adoption of the report

Notes on the provisional agenda

The Commission at its nineteenth session (1986) decided to begin the preparation of model rules on electronic funds transfers. 1/ The Commission entrusted this task to the Working Group on International Payments. The Working Group began its work at its sixteenth session (Vienna, 2-13 November 1987) by considering, on the basis of document A/CN.9/WG.IV/WP.35, legal issues that should be dealt with by the model rules. At that session the Working Group requested the Secretariat to prepare draft provisions of the model rules to be considered at the seventeenth session of the Working Group (A/CN.9/297).

1/ Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17), para 230.

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At its seventeenth session (New York, 5-15 July 1988) the Working Group considered a draft of Model Rules on Electronic Funds Transfers prepared by the Secretariat (A/CN.9/WG.IV/WP.37). At the conclusion of the session the Working Group requested the Secretariat to prepare a revised draft of the Model Rules taking into account the considerations and the decisions of the Working Group (A/CN.9/317, para 10).

At its eighteenth session (Vienna, 5-16 December 1988) the Working Group considered the revised draft prepared by the secretariat contained in A/CN.9/WG.IV/WP.39. The Working Group decided that the name of the draft should be changed to draft Model Law on International Credit Transfers.

The Working Group continued its consideration of the draft provisions at its nineteenth, twentieth and twenty-first sessions.

The text of the Model Law to be considered by the Working Group at its twenty-second session is contained the report of the twenty-first session of the Working Group (A/CN.9/341, annex) as well as in A/CN.9/WG.IV/WP.49 with comments.

The Commission at its twenty-third session (New York, 25 June - 6 July 1990) requested the Working Group to present to it a text for consideration at the Commission's twenty-fourth session in 1991.

The Working Group is composed of all States members of the Commission. These are:

Argentina, Bulgaria, Cameroon, Canada, Chile, China, Costa Rica, Cuba, Cyprus, Czechoslovakia, Denmark, Egypt, France, Germany, Federal Republic of, Hungary, India, Iran, Iraq, Italy, Japan, Kenya, Lesotho, Libyan Arab Jamahiriya, Mexico, Morocco, Netherlands, Nigeria, Sierra Leone, Singapore, Spain, Togo, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, and Yugoslavia.

Item 1. Election of officers

The Working Group, in accordance with its practice at previous sessions, may wish to elect a Chairman and a Rapporteur.

Item 3. Preparation of Model Law on International Credit Transfers

The following documents will be made available at the session:

(a) Report of the Working Group on International Payments on the work of its sixteenth session (A/CN.9/297);

(b) Report of the Working Group on International Payments on the work of its seventeenth session (A/CN.9/317);

(c) Report of the Working Group on International Payments on the work of its eighteenth session (A/CN.9/318);

(d) Report of the Working Group on International Payments on the work of its nineteenth session (A/CN.9/328);

(e) Report of the Working Group on International Payments on the work of its twentieth session (A/CN.9/329);

(f) Report of the Working Group on International Payments on the work of its twenty-first session (A/CN.9/341);

(g) International Credit Transfers: Comments on the draft Model Law on International Credit Transfers, report of the Secretary-General (A/CN.9/WG.IV/WP.49).

Item 5. Adoption of the report

The Working Group may wish to adopt, at the close of its session, a report for submission to the twenty-fourth session of the Commission.

Meetings

The session of the Working Group will take place at the Vienna International Centre. Meetings are scheduled from 26 to 30 November and from 3 to 7 December 1990. No meeting will be scheduled for Thursday, 6 December in order to allow for the preparation of the draft report of the session. Meeting hours will be from 9:30 to 12:30 and from 14:00 to 17:00 except on Monday, 26 November 1990, when the session will commence at 10:30 am.